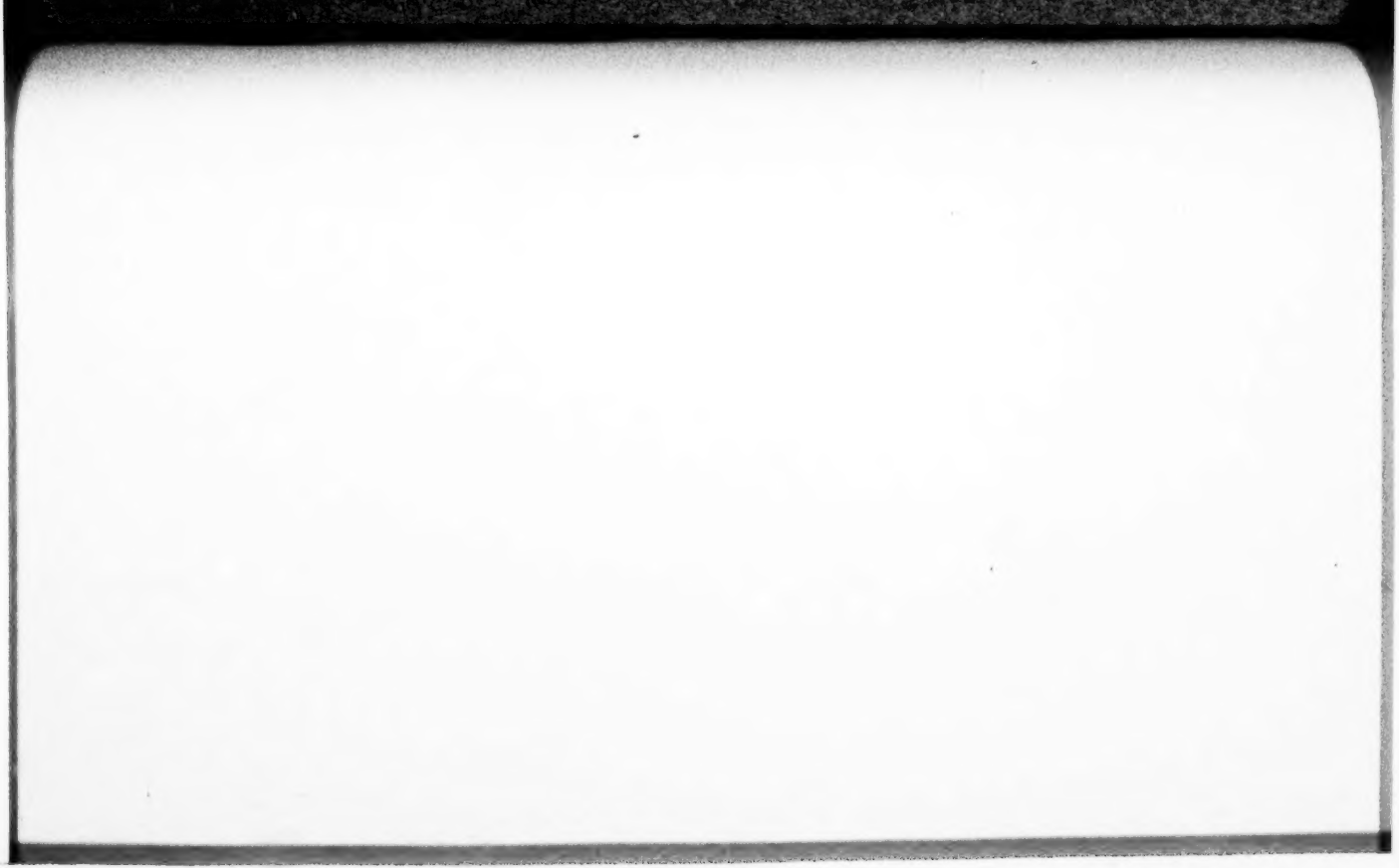

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

FANNIE E. LANG, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–16) is reported in 23 B. T. A. 854. The opinion of the Circuit Court of Appeals (R. 24–32) is reported in 61 F. (2d) 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 8, 1932. (R. 33.) Petition for writ of certiorari was filed January 4, 1933. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Real property acquired by petitioner and her husband as tenants by the entirety in 1915 was sold by petitioner as the surviving tenant in 1925, her husband having died in 1924. The question presented is whether the basis for determining the gain on the sale in 1925 is the original cost of the property or whether Section 204 (a) (5) of the Revenue Act of 1926 requires that the value of the property at the date of the husband's death should be taken into consideration.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 12–13), in so far as material to consideration of the present petition, may be summarized as follows:

In 1915 petitioner and her husband purchased certain residential property in Maryland at a cost of $13,000, of which amount petitioner contributed $1,560 and her husband the balance. Title was taken by the purchasers as tenants by the entirety. (R. 12, 13.) Certain permanent improvements, which cost $1,500, were paid for exclusively by peti-

tioner's husband. (R. 13.) In 1924 petitioner's husband died, leaving petitioner as executrix and sole beneficiary of his estate. The property held in the tenancy by the entirety then had a market value of $40,000. The real estate was included in the estate tax return filed by the petitioner as executrix, being valued at $35,200, or 88 per cent of the value at the time of the husband's death, which percentage represents the portion of the original cost paid by the decedent. (R. 13.) On or about July 1, 1925, petitioner sold the real estate for $40,000. In computing the profit realized on this transaction, petitioner deducted from the net sale price the amount she had contributed to the original purchase price in 1915, plus 88 per cent of the market value at the time of her husband's death. The Commissioner determined a deficiency in income tax by using the 1915 cost as the basis for computing the amount of profit realized on the sale. (R. 13.) The Commissioner's determination was reviewed by the Board and affirmed. (R. 16.) The court below affirmed the Board. (R. 33.)

ARGUMENT

Petitioner contends that the gain upon the sale of the property in 1925 should be measured not by the cost of the property in 1915, but by the sum contributed by her toward its purchase in 1915, plus the value of her husband's interest in the property at the time of his death.

The argument rests upon Section 204 (a) (5) of the Revenue Act of 1926, *infra*, which provides that if property "was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition * * *" and is founded upon the assumption that a tenant by the entirety acquires only a proportionate interest upon the creation of the estate, based upon the relation between his or her contribution and the total purchase price, the remainder of the estate being acquired by inheritance when the other tenant dies.

Section 204 (a) is part of the income tax title of the 1926 Act. It provides that the basis for determining the gain or loss from the sale of property acquired after February 28, 1913, shall be the cost of the property. Its various subsections deal with situations in which exceptions to this general rule may occur.

Section 204 (a) (5) specifies various methods by which property must be acquired to be within the exception. In addition to property acquired by "bequest devise, or inheritance," Section 204 (a) (5) is expressly made applicable to transfers made in contemplation of or intended to take effect at death and to property passing under a general power of appointment. In view of the specific references to acquisition of property by means other than "bequest, devise, or inheritance," it seems clear that Congress used those words in a technical

sense and not broadly, with the purpose of including therein property which by any possibility might be regarded as acquired through those methods. As Section 204 (a) (5) contains exceptions to the general provision, the presumption is that Congress stated all the exceptions it intended to state.[1] See *United States* v. *Scharton*, 285 U. S. 518, 521–522; *Bend* v. *Hoyt*, 13 Pet. 263, 272–273.

The omission from this section of estates by the entirety is merely a recognition that such estates vest in both spouses in their entirety when created, and that the gain upon their subsequent final disposition is to be determined as of that time.[2] Accordingly, the court below correctly held that Section 204 (a) (5) has no application to the pres-

[1] The committee reports accompanying the statutes in which the present section first appeared do not indicate that Congress intended that any unusual meaning should be attributed to the words "bequest, devise, or inheritance" in this section. See House Report No. 350 (67th Cong., 1st Sess.), p. 9; Senate Report No. 275 (67th Cong., 1st Sess.), p. 10; Senate Report No. 398 (68th Cong., 1st Sess.), p. 17.

[2] The decisions in Maryland, where the property involved in the present case was situated, establish a State rule of property entirely consistent with the common law concerning the character and incidents of estates by the entirety. Under those decisions the whole estate vests in the tenants as one person at the time the estate is created, regardless of the amount contributed by each respectively, and upon the death of either the entire estate belongs to the other, not by virtue of devise or inheritance, but by virtue of the title that vested under the original limitation. See *Cunningham* v. *Cunningham*, 158 Md. 372; *Ades* v. *Caplin*, 132 Md. 66; *Frey* v. *McGaw*, 127 Md. 23.

ent case, since it relates only to property acquired by "bequest, devise, or inheritance."

If the contrary view urged by petitioner were adopted, profits realized upon the sale of such property might in large measure escape the income tax. Grants of immunity from taxation are, however, strictly construed in favor of the sovereign. See *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480, 491; *Parrott* v. *Commissioner,* 30 F. (2d) 792 (C. C. A. 9th), certiorari denied, 279 U. S. 870.

The Treasury Regulations interpreting the statutes defining gain or loss from a sale in connection with property acquired by bequest, devise, or inheritance, are in accord with our position. See Regulations 62, Arts. 1561, 1563; Regulations 65, Arts. 1591, 1594; Regulations 69, Arts. 1591, 1594, *infra.* And the same is true of the rulings of the Bureau, which are to the effect that the basis to be used in case of sale by the surviving spouse of property held by husband and wife as tenants by the entirety is the same as if the survivor alone had owned property from the date of its acquisition by husband and wife. See I. T. 1635, II–1 C. B. 19; G. C. M. 6677, VIII–2 C. B. 172. See also *Boykin* v. *Commissioner,* 16 B. T. A. 477; and see *Carpenter* v. *Commissioner,* 27 B. T. A. 282, which reaches a similar result under the but slightly different provisions of Section 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818 (U. S. C. Sup. VI, Title 26, Sec. 113).

Petitioner contends, however, that the decision of the court below is in conflict with *Commissioner* v. *Fletcher Savings & Trust Co.*, 59 F. (2d) 508 (C. C. A. 7th). That case arose under Section 303 of the Revenue Act of 1924, *infra*, and involved the estate tax. That section provides that in computing the value of the net estate of the decedent there shall be deducted from the value of the gross estate "an amount equal to the value of any property * * * forming a part of the gross estate * * * of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise, or inheritance * * *."

In the *Fletcher case* the question was whether one-half of the property going to the survivor of a tenancy by the entirety was received by such survivor as property received from the decedent by "inheritance." The court there held that the survivor had acquired the property by inheritance, which, under its view of the statute then under consideration, was not restricted in its meaning to the acquisition of property by one person as heir to another.

We submit that there is no conflict between the present case and *Commissioner* v. *Fletcher Savings & Trust Co., supra.* In the latter case the court stated at the outset (p. 509) that "The sole controversy in this appeal arises over the construction of

section 303 (a) (2) of the Revenue Act of 1924," which is a part of the estate tax title of the 1924 Act and deals with one of the authorized deductions for purposes of computing that tax. The court in the instant case was concerned with an entirely different provision in another portion of the tax laws. Section 204 (a) (5), as we have shown above, contains stated exceptions to a general revenue provision and is, therefore, to be strictly construed.

The mere fact that the courts have construed the same word appearing in two different statutes in two different ways does not create a conflict of decisions. As this Court said in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433:

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and the circumstances under which the language was employed.

Petitioner also contends that the imposition of the tax upon the sale of the property will result in double taxation, since an estate tax was levied in respect of the same interest. It is plain, however, that the two taxes are different in kind, and no objection can be sustained merely because they may

fall upon the same subject matter at different times and in different hands. See *Hellmich* v. *Hellman*, 276 U. S. 233; *Perthur Holding Corp.* v. *Commissioner*, 61 F. (2d) 785 (C. C. A. 2d); *Newman, Saunders & Co., Inc.* v. *United States*, 68 C. Cls. 641, certiorari denied, 281 U. S. 760.

CONCLUSION

The decision of the court below is correct. There seems to be no conflict of decisions and the petition should be denied.

Respectfully submitted.

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JANUARY, 1933.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 14—

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act;

* * * * *

(U. S. C. App., Title 26, See 935.)

Revenue Act of 1924, c. 234, 43 Stat. 253, 305—

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(2) An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (B) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such prior decedent as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate and not deducted under paragraph (1) or (3) of this subdivision.

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 69:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592–1602. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

(1) The cost of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 204 (a) and articles 1592 and 1594, the basis therein provided), or

(2) The fair market value of such property as of March 1, 1913, whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. In determining the fair market value of stock in a corporation, due regard shall be given to the fair market value of the corporate assets on the basic date. In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

ART. 1594. *Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.*— In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a bona fide sale for an adequate and full consideration in money or money's worth)—

(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of

or intended to take effect in possession or enjoyment at or after death; and

(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

MRS. FANNIE E. LANG, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–14) is reported in 23 B. T. A. 854. The opinion of the Circuit Court of Appeals (R. 21–28) is reported in 61 F. (2d) 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 8, 1932. (R. 29.) Petition for writ of certiorari was filed January 4, 1933, and the writ was granted February 6, 1933. (R.

31.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Real property acquired in 1915 by the petitioner and her husband as tenants by the entirety was sold by petitioner as the surviving tenant in 1925, her husband having died in 1924. The question presented is whether the basis for determining the gain on the sale is the cost of the property in 1915, as held by the court below, or the amount contributed to the purchase price by the petitioner in 1915 plus that portion of the value of the property at her husband's death which was included as part of his gross estate, as contended by the petitioner.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, pages 23–28, *infra*.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 11–12), in so far as material to consideration of the question presented, may be summarized as follows:

In 1915 petitioner and her husband purchased certain residential property in Maryland at a cost of $13,000, of which amount petitioner contributed $1,560 and her husband the balance. Title was taken by the purchasers as tenants by the entirety.

(R. 11.) Certain permanent improvements, which cost $1,500, were paid for exclusively by petitioner's husband. (R. 11.) In 1924 petitioner's husband died, leaving petitioner as executrix and sole beneficiary of his estate. The property held in the tenancy by the entirety then had a market value of $40,000. The real estate was included in the estate tax return filed by the petitioner as executrix at a value of $35,200, or 88 per cent of the value at the time of the husband's death, which percentage represents the portion of the original cost paid by the decedent. (R. 11.) On or about July 1, 1925, petitioner sold the real estate for $40,000. In computing the profit realized on this transaction, petitioner deducted from the net sale price the amount she had contributed to the original purchase price in 1915, plus 88 per cent of the market value at the time of her husband's death. In determining a deficiency in the petitioner's income taxes for the year 1925 the Commissioner used the 1915 cost as the basis for computing the amount of profit realized on the sale. (R. 11–12.) The Commissioner's determination in this respect was affirmed by the Board of Tax Appeals[1]. (R. 14.) The court below affirmed the Board. (R. 29.)

SUMMARY OF ARGUMENT

The sole question is one of statutory construction to determine whether, upon the sale of prop-

[1] The Commissioner and the Board allowed certain adjustments for selling expenses and cost of improvements, the amounts of which are not now in dispute. (R. 12, 14.)

erty by the survivor of a tenancy by the entirety, Congress intended to tax the whole of the gain realized upon the sale or only a part thereof. The general rule laid down by Section 204 (a) of the Revenue Act of 1926 is that the basis for determining gain or loss on a sale is the cost of the property. The exception contained in Section 204 (a) (5) relating to property acquired by bequest, devise or inheritance is not applicable here. The petitioner did not acquire the property within the general meaning of the word "inheritance" as heir to her husband, but rather by virtue of the original grant coupled with the fact of his death. Moreover, the fact that Congress deemed it necessary to specify transfers made in contemplation of or intended to take effect at death and property passing by power of appointment as being within the operation of Section 204 (a) (5) shows that the words "bequest, devise, or inheritance" were used in their technical sense and not broadly with the purpose of including property which by any possibility might be regarded as acquired through those methods. The Treasury regulations, Bureau rulings and decisions of the Board of Tax Appeals support our contention; no decision of this or other courts is opposed to it, and it is in keeping with the general policy of Congress to tax income to its full extent, in the hands of the recipient.

ARGUMENT

UNDER THE APPLICABLE STATUTE THE BASIS FOR DETERMINING THE TAXABLE GAIN WAS THE COST OF THE PROPERTY AT THE DATE OF PURCHASE

Petitioner and her husband purchased property at a total cost of $13,000 and petitioner, after her husband's death, sold the same property for $40,000. The difference between the two amounts plainly constitutes a realized gain or income, within the power of Congress to tax. The inquiry in this case is limited to the question whether Congress has evidenced an intention to lay an income tax upon the whole of the gain so realized or only upon a part, as contended by petitioner. We submit that an examination of the applicable provisions of the Revenue Act of 1926 shows a legislative intent to tax the whole of the gain, as the Board and the Circuit Court of Appeals held.

Section 204(a) of the Revenue Act of 1926, the material portions of which are contained in the Appendix (*infra,* p. 23), specifies the basis for determining gain or loss for income tax purposes on the sale of property acquired after February 28, 1913. It provides that the basis shall be the cost of the property, with certain exceptions set forth in subdivisions 1 to 11 of the section. The petitioner contends that the general rule that cost is the basis is not applicable here, but that the present case is governed by the exceptions contained in Section 204(a)(5) (*infra,* p. 23), providing that if the property was acquired by bequest,

devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

The contention is founded, we submit, on the fallacious assumption that upon the creation of the estate when the property was purchased in 1915, the petitioner as a tenant by the entirety acquired only a proportionate interest therein, based upon the relation between her contribution and the total purchase price, the remainder being acquired by inheritance when the other tenant died. If, as the petitioner suggests, she received from her husband at the date of his death a portion of the property measured by the husband's contribution to the original purchase price, it would follow that where the wife contributed no part of the purchase price at the time of the creation of the estate, she would acquire and hold no interest whatsoever therein during the life of her husband.

This theory is directly opposed both to the common law concerning the nature of estates by the entirety,[2] and to the decisions in Maryland, where the property was situated. The decisions of that State establish that each of the tenants is vested with title to the entire property from the time the estate is created, without regard to the contribu-

[2] See *United States* v. *Robertson*, 183 Fed. 711, 714 (C. C. A. 7th), certiorari denied, 220 U. S. 616; *Hamilton* v. *Fowler*, 99 Fed. 18, 26 (C. C. A. 6th), certiorari denied, 176 U. S. 685; *Garner* v. *Jones*, 52 Mo. 68, 71; *Thornton* v. *Thornton*, 3 Rand. (Va.) 179; *Beddingfield* v. *Estill & Newman*, 118 Tenn. 39; 2 *Thompson on Real Property*, Sec. 1735.

tions which each makes to the purchase price. Upon the death of one tenant the whole continues in the survivor, not by virtue of devise or inheritance, but by virtue of the title that vested at the outset. *Cunningham* v. *Cunningham,* 158 Md. 372, 376, 377; *Ades* v. *Caplin,* 132 Md. 66; *Frey* v. *McGaw,* 127 Md. 23.

The word "inheritance" in Section 204 (a) (5) of the Act, if given its ordinarily accepted meaning, plainly does not include property which vested in a surviving wife not as an heir to her husband, but by reason of the original grant. Petitioner maintains, however, that upon the death of her husband full control of the property passed to her and that her consequently expanded enjoyment of the property partakes of the "quasi-character of inheritance." Thus the petitioner argues that the word "inheritance" was used in a broad sense to include all property which might by any possibility be conceived of as passing by that process. This argument is negatived, we believe, by the second sentence of the subdivision, which discloses that Congress did not intend to use the word in an omnibus fashion. That sentence provides that the provision of the paragraph—

> * * * shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act; * * *

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The subdivisions to which reference is made (see subdivisions (c) and (f), Section 302 of the Revenue Act of 1926 (*infra*, pp. 24, 26)), relate to transfers made in contemplation of or intended to take effect at death and to property passing under a power of appointment. By an argument similar to that now urged by petitioner, it might be contended that property passing by one of those methods should be construed as passing by "bequest, devise, or inheritance"; but since Congress enumerated the interests which it intended to include, in addition to those comprehended by the usual meaning of those words, it seems clear that Congress used the words "bequest, devise, or inheritance" in their technical sense and not broadly.

The interest held as tenants by the entirety is specifically included in the estate of a decedent for estate-tax purposes by subdivision (e) of Section 302 of the Revenue Act of 1926, *infra*, p. 26, just as transfers in contemplation of or intended to take effect at or after death and property passing under power of appointment are included under subdivisions (c) and (f) of the same section, *infra*. But while the latter two are embraced within the exceptions of Section 204(a) (5), estates by the entirety are not included. Under these circumstances the maxim *expressio unius est exclusio alterius*, is clearly applicable.[3] Congress specifically desig-

[3] Further evidence that Congress meant to exclude what was not expressly included in section 204 (a) (5) is found in the treatment accorded to interests transferred in trust with

nated the character of interest to which the standard of fair market value at the date of acquisition by bequest, devise, or inheritance should apply, and carefully omitted estates by the entirety, recognizing no doubt that such estates vest in both spouses in their entirety when created and that the gain after their final disposition is to be based on the capital investment at the time of their creation.[4]

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the reservation of the power to alter, amend, or revoke. Under the Revenue Acts of 1924 and 1926 such interests were included as part of the gross estate of the decedent who made the transfer and reserved the power. (Section 302 (d) of the Revenue Acts of 1924 and 1926.) Under the Revenue Act of 1924, upon a subsequent sale of the property by the trustee, the basis for gain or loss was provided, by specific inclusion of the property in Section 204 (a) (5) of that Act, to be the value at the date of death of the decedent. But the interest was excluded from the operation of Section 204 (a) (5) of the Revenue Act of 1926 by omitting specific reference thereto in that subdivision. The fact that the omission was intended to take the property from the rule applicable to bequest, devise, or inheritance and to require as a basis the value in the hands of the donor, thus taxing the whole of the gain derived, is made apparent by the committee reports on the bill. See H. Rep. No. 1, 69th Cong., 1st Sess., p. 6; S. Rep. No. 52, 69th Cong., 1st Sess., pp. 16–17.

[4] That the failure to include estates by the entirety in the exceptions relating to property acquired by bequest or inheritance was not a *casus omissus* is evidenced by their consistent treatment under earlier Acts. While the Revenue Acts of 1921 and 1924 included in the gross estate of a decedent the interest held as tenants by the entirety as well as those transferred in contemplation of death and by power of appointment (Section 402 (c), (d), and (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 302 (c), (d), and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253

The Treasury regulations interpreting the statutes defining gain or loss from a sale in connection with property acquired by bequest, devise, or inheritance are in accord with our position and the decision of the court below. In defining such property they have consistently included transfers in contemplation of or intended to take effect at death and property passing by power of appointment, but have omitted estates by the entirety. Regulations 62, Articles 1561, 1563; Regulations 65, Articles 1591, 1594; Regulations 69, Articles 1591, 1594, *infra*, pp. 27–28. The Bureau of Internal Revenue has ruled that the basis to be used in case of sale by the surviving spouse of property held by husband and wife as joint tenants or tenants by the entirety, is the same as if the survivor alone had owned the property from the date of its acquisition by husband and wife. I. T. 1635, II–1 C. B. 19; G. C. M. 6677, VIII–2 C. B. 172. The decisions of the Board of Tax Appeals support that view. Cf. *Boykin* v. *Commissioner*, 16 B. T. A. 477. And see *Carpenter* v. *Commissioner*, 27 B. T. A. 282, which reaches a similar result as to joint tenants under the provisions of Section 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818 (U. S. C.

(U. S. C., Title 26, Sec. 1094)), these Acts as well as the Revenue Act of 1926 have included the latter two interests in the basis prescribed for gain or loss of property acquired by bequest, devise, or inheritance but have omitted estates by the entirety from the class. Section 204 (a) (5) of the Revenue Act of 1921 and Section 204 (a) (5) of the Revenue Act of 1924 (U. S. C., Title 26, Sec. 935).

Sup. V, Title 26, Sec. 2113). The consistent administrative treatment is entitled to great weight, having received legislative approval by the reenactment of the statutory provisions without change.

We submit that the language of Section 204 (a) (5) of the Revenue Act of 1926 may not be construed to establish as a basis for gain or loss on a sale of an estate by the entirety, the market value of any portion of the property at the date of death of one of the tenants. There is no evidence that Congress intended that result; on the contrary, examination of the statute shows a clear legislative purpose to establish as the basis the cost of the property at the date of its acquisition.

As Section 204 (a) contains exceptions to the general provision, the presumption is that Congress stated all the exceptions it intended to state. See *United States* v. *Scharton,* 285 U. S. 518, 521–522; *Bend* v. *Hoyt,* 13 Pet. 263, 272–273. Petitioner has failed to bring this case within any of the enumerated exceptions and the general provision of Section 204 (a) is therefore, as the court below held, applicable.

No decisions of this Court or of any other court are opposed to the conclusion for which we contend. Petitioner has suggested that there is an inconsistency between the view we have urged and the application of the estate tax to property held on a tenancy by the entirety. But we believe that the cases relied on are readily distinguishable.

In *Tyler* v. *United States,* 281 U. S. 497, it was held that, in computing the value of the gross estate of a decedent subject to the estate tax, property held as a tenant by the entirety might constitutionally be included; the tax was upheld as a valid indirect tax measured by the value of the property, rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety. In *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, this Court held that the estate tax was not invalid in a case where the entirety had been created before the enactment of the Act under which it was taxed, but subsequent to the passage of the Revenue Act of 1916, which for the first time adopted a system of death taxes embracing estates by the entirety. In *Third National Bank and Trust Co.* v. *White,* No. 202, October Term, 1932 (decided December 19, 1932), this Court, without opinion other than the citation of the *Tyler case* and *Gwinn* v. *Commissioner,* 287 U. S. 224, affirmed a decision holding valid an estate tax upon an estate by the entirety created before the passage of the Revenue Act of 1916. We submit that these decisions are not in conflict with that of the court below. They do not hold that the survivor acquires any portion of the property by "bequest, devise, or inheritance," nor was it necessary to support the decisions that the property should have been so acquired.

The statute in the *Tyler case* specifically included, for the purposes of the estate tax, the inter-

est held as tenants by the entirety by the decedent and spouse, and this Court indicated that in the absence of a provision to that effect its inclusion would probably not be justified. The tax was sustained both because it tended to prevent evasion of the estate tax and because the event of the tenant's death relieved the property from the restrictions imposed by law upon the rights of the surviving tenant and hence was the generating source of important and definite accessions to the property rights of the survivor. If, as this Court stated, the fact that death was the generating source of such accessions supports the tax, then it follows, as in the *Third National Bank case,* that the tax is validly laid even where the original creation of the estate antedated the first statute which laid a tax thereon at death. But this Court in the *Tyler case* did not indicate that the survivor acquired the property by descent or inheritance. It was carefully shown in the opinion that (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a " transfer " of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

As was said in *Porter* v. *Commissioner,* decided March 13, 1933, No. 466, October Term, 1932:

> The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death.

The same principle was announced in the decision in *Chase National Bank* v. *United States,* 278 U. S. 327, in which it was held that insurance proceeds need not pass directly from the decedent to the survivor in order to support the estate tax. There this Court said in part (p. 337):

> Obviously, the word " transfer " in the statute, or the privilege which may constitutionally be taxed, can not be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

It is clear that the death of one tenant did not accomplish a transfer of the property or any part thereof from the decedent to the survivor by descent or inheritance. The limitations upon the survivor's rights caused by the co-equal rights of the other ceased upon that other's death and a corresponding right of sole enjoyment and of disposition of the corpus arose at the same time in the survivor by virtue of death. The petitioner here, as well as her husband, was vested with the property as a whole after the creation of the estate. His death was the

occasion which released the limitations on her property rights, but her powers of sole enjoyment and disposition were not received by inheritance; they resulted from the original grant, followed by the event of death.

We believe that the decision in *Commissioner* v. *Fletcher Savings & Trust Co.*, 59 F. (2d) 508 (C. C. A. 7th), is not opposed to our contention here. That case involved the estate tax and arose under Section 303 (a) (2) of the Revenue Act of 1924 (U. S. C., Title 26, Sec. 1095), providing that in computing the value of the net estate of the decedent there should be deducted "an amount equal to the value of any property * * * forming a part of the gross estate * * * of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise, or inheritance." The question to be decided was whether one-half of the property going to the survivor of a tenancy by the entirety, was received by such survivor from the decedent by "inheritance." In construing the statute involved the court accepted the words broadly and held that the survivor of a tenancy by the entirety did receive the property from the decedent by "inheritance." Even if it be assumed that the correct result was reached in the *Fletcher case*, nevertheless that decision does not conflict with the present case. In that case the court

stated at the outset (p. 509) that "The sole controversy in this appeal arises over the construction of section 303 (a) (2) of the Revenue Act of 1924," a part of the estate tax title of the 1924 Act dealing with one of the authorized deductions for purposes of computing that tax. Here, the Court is concerned with an entirely different provision in the income-tax portion of the revenue laws. It is settled that the same words appearing in different contexts in the same statute need not be construed as having the same meaning. As this Court said in *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433:

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.[6]

The considerations affecting the interpretation of the word "inheritance" in the *Fletcher case* and in the instant case are entirely different. In the former the purpose of the provision in which this word appears was to avoid a duplication of the

[6] Compare *Jones* v. *Clifton*, 101 U. S. 225, with *Burnet* v. *Guggenheim*, No. 283, October Term, 1932, decided February 6, 1933; also, *American Security Co.* v. *District of Columbia*, 224 U. S. 491, with *Heald* v. *District of Columbia*, 254 U. S. 20.

estate tax upon the same property within five years; a broad construction of the section to accomplish this purpose may therefore be permissible. See *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263. But Section 204 (a) (5) of the Revenue Act of 1926, involved in the present case, contains, as we have shown above, stated exceptions to a general revenue provision and should be strictly construed. The construction for which we contend is in keeping with the general policy of Congress to tax income to its full extent. See *Irwin* v. *Gavit*, 268 U. S. 161, 166; Revenue Act of 1926, Section 213 (a), *infra*.

The difference between the price paid by the petitioner and her husband ($13,000) and the amount for which the property was sold by the petitioner ($40,000) represented income which could be taxed. Prior to the time of the sale no part of this gain had been subjected to an income tax. Petitioner was the recipient of the entire increase on the sale; although she did not have an unrestricted right in the property during the whole time that the income accrued, she had a coequal right therein throughout. Under these circumstances the requirement that she should report such increase as income is neither arbitrary nor unreasonable.[7] It accords with the general policy of the law to follow income into the hands of the recipient and tax it there.

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[7] In *Taft* v. *Bowers*, 278 U. S. 470, the tax was sustained even though the seller had no title or rights in the property during a portion of the time that an increase in value accrued.

The result of the construction urged by petitioner would be to free from any tax whatsoever that portion of the profits resulting from the sale by the survivor of an estate by the entirety, representing capital accretions between the date of the creation of the estate and the death of the deceased tenant, in cases where the estate of the decedent does not exceed the amount of the estate tax exemption. In every case of such a sale, moreover, a portion of the appreciated value of the property would escape the income tax. While that result may occur under other but somewhat similar circumstances by express provisions of the statutes, immunity from taxation should not be extended in the absence of specific legislation requiring such a result. See *Pacific Co., Ltd.*, v. *Johnson*, 285 U. S. 480, 491.

Petitioner suggests that the construction for which we contend results in double taxation and argues that an interpretation reaching that result should be avoided. We submit that this contention is without merit. The fact that the market value of a portion of the property corresponding to the amount contributed by the decedent husband is subjected to the estate tax, does not require a construction of the provisions here involved so as to afford exemption from the income tax. The imposition of a tax upon the sale of the property does not result in double taxation merely because an estate tax was levied at an earlier time, though measured by the same property. The two taxes are imposed at different times and upon property

in different hands, they do not fall upon the same interest, and hence no problem of double taxation is presented. Even if the divergent nature of the two taxes and the difference in their incidence is disregarded, multiple taxation of the same subject matter occurring at entirely different times and in different hands, is not objectionable. See *Hellmich* v. *Hellman,* 276 U. S. 233; *Patton* v. *Brady,* 184 U. S. 608; and see *Perthur Holding Corp.* v. *Commissioner,* 61 F. (2d) 785 (C. C. A. 2d), certiorari denied March 13, 1933, No. 666, October Term, 1932. Petitioner suggests that the conclusion for which we contend will single out property held in a tenancy by the entirety while other forms of tenancy will escape the income tax. But certainly joint tenancies and property held in trust subject to the right to revoke by the creator are in the same case. The petitioner urges that tenancies in common would be treated differently, but that is because in such tenancies there is no right of survivorship, and the present problem would not arise.

While in *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189, this Court said that duplication of income and estate taxes upon the proceeds of a life insurance policy was to be avoided unless required by express words, the decision was based on the express terms of the Act there involved. The language of Section 213(b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, specifically excluded from gross income the proceeds of a life insurance policy paid to individual beneficiaries or to the estate of

the insured. This Court held that a corporate beneficiary, as well as an individual, was entitled to the benefit of this provision by virtue of Section 233(a) of the same Act, which applied to the gross income of corporations the definition prescribed for individuals by Section 213. Here, however, there is no doubt concerning the propriety of the estate tax nor the fact that gains from the sales of property are taxable by virtue of Section 213(a) of the Revenue Act of 1926, while it is equally clear that no excepting provisions of the Act relieves the property here involved from the tax now sought to be imposed.

Nichols v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584, does not hold that the inclusion of an interest for the purpose of an estate tax fixes capital value as corpus upon a subsequent sale. In that case a single item, partnership commissions paid to the executor after the death of the decedent, was sought to be treated as a part of the value of the gross estate for estate tax purposes and as part of the gross income for income tax purposes, and the court held that it could not be made to serve in both capacities. In that case there was no difference in taxable entity or in the incidence of the tax and the Government was in effect contending that the same fund was income for one purpose and corpus for another. No such situation is presented here. A portion of the property held on a tenancy by the entirety may be subject to the estate tax upon the death of one of the

tenants. But its value at that time need not represent the basis for gain or loss on a subsequent sale; for the purpose of Congress was to tax the whole of the gain whenever derived upon the sale of the property quite regardless of its valuation at another time and for another purpose as part of the predeceasing tenant's estate.

If there is any seeming hardship here, it results from the fact that the cost of the property was less than its value at the date of the decedent's death. If the value of the property had decreased between the date of purchase and the date of death of one tenant and the sale price was greater than the value at the date of death, the use of the market value at the time of decedent's death as the basis would result in a greater tax. Likewise, where the value at the date of death of the predeceasing tenant is less than cost and the ultimate sale price is still less, the provision will frequently operate to the advantage of the taxpayer, since the same basis is provided by the statute for computing losses as well as gains. The fact that an estate tax has been imposed upon value at time of death cannot influence these fortuitous and divergent results. Where different circumstances produce different results, there is no force to the argument that a certain construction of a statute should be avoided because productive of hardship in some cases. See *Burnet* v. *Guggenheim*, No. 283, October Term, 1932, decided February 6, 1933.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

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APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 14, 23, 70:

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act; * * *. (U. S. C. App., Title 26, Sec. 935.)

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal

service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period. (U. S. C. App., Title 26, Sec. 954.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the

value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relin-

quishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by

deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. (U. S. C. App., Title 26, Sec. 1094; U. S. C. Sup. VI, Title 26, Sec. 411.)

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592–1602. * * *.

ART. 1594. *Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.*—In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a bona fide sale for an adequate and full consideration in money or money's worth)—

(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death; and

(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed

executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

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